Internal Investigations: Landmines and Best Practices

Jason Varnado
Partner
Jones Day
jvarnado@jonesday.com
832.239.3766

Adrienne Frazior
Shareholder
Polsinelli LLP
afrazior@polsinelli.com
214.661.5596

Carrington Giammittorio
Partner
Haynes Boone LLP
Carrington.Giammittorio@haynesboone.com
214.651.5256

Nick Bunch (moderator)
Partner
Haynes Boone LLP
Nick.bunch@haynesboone.com
214.651.5537

Common Investigation Triggers

- Formal Complaint from Whistleblower or Victim
- Anonymous Complaint
- Reports to Supervisor or Management
- Government Agency Complaint or Inquiry
- Civil Lawsuit or Criminal Complaint
- Accident or Injury
- Media Reports or Inquiries

Benefits of Internal Investigation

- Opportunity to remove or sanction wrongdoers.
- Demonstrate commitment to compliance and code of conduct.
- Management review of existing corporate policies for effectiveness.
- Government leniency.
- Future credibility from active program of internal investigations.
- Early and accurate assessment of exposure and the avoidance of formal legal proceedings and expenses (and may avoid civil liability).
- Protections for Board of Directors and/or senior management.
- Fulfills duty to investigate a report of material securities law violation (Sarbanes-Oxley).

Risks of Internal Investigation

- Assuming the investigation is done well, there are issues to consider:
  - Commitment to conclusions may take longer, cost more, and require more attention than anticipated.
  - Alarm auditors, making it difficult to get them to sign off on financials.
  - Expose evidence to discovery that outside parties may seek through subpoena.
  - Possibly reveal need for remedial measures company does not want.
  - Reveal evidence that exposes corporation to criminal or civil liability.

Organization as the Client

- **ABA Model Rule 1.13 – Organization As Client**
  - **1.13(a).** A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
  - **1.13(b).** The lawyer must take measures designed to minimize disruption to the organization and the risk of revealing information relating to the representation to persons outside the organization.
  - **1.13(f).** In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.
  - *See also* Texas Disciplinary Rules of Professional Conduct § 1.12(e)
- **Because the organization is the client, every interview should begin with an *Upjohn Warning*. No exceptions.**

Representation of Individuals

ABA Model Rule 1.7 – Conflict of Interests: Current Clients

- **(a)** Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
  - 1) the representation of one client will be directly adverse to another client; or
  - 2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
- **(b)** Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
  - 1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
  - 2) the representation is not prohibited by law;
  - 3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
  - 4) each affected client gives informed consent, confirmed in writing.

Title search: Internal Investigations: Landmines and Best Practices

Also available as part of the eCourse
2025 Corporate Counsel eConference

First appeared as part of the conference materials for the
47th Annual Corporate Counsel Institute session
"Handling Internal Investigations: Landmines and Best Practices"